

BEFORE THE NATIONAL LABOR RELATIONS BOARD  
UNITED STATES OF AMERICA  
THIRTIETH REGION

Milwaukee, Wisconsin

**LAIDLAW TRANSIT SERVICES, INC.**

**Employer**

**and**

**Case 30-UC-402**

**AMALGAMATED TRANSIT UNION, LOCAL 998,  
AFFILIATED WITH THE AFL-CIO**

**Petitioner**

**DECISION AND ORDER DENYING UNIT CLARIFICATION<sup>1</sup>**

Amalgamated Transit Union, Local 998, affiliated with the AFL-CIO (Union) filed a unit clarification petition under Section 9(b) of the Act, seeking to include in the existing unit all drivers who drive buses which convey employees of Goodwill Industries. Laidlaw Transit Services, Inc. (Employer) contends that the unit should not be clarified. I have concluded that the Goodwill drivers do not share a sufficient community of interest with the drivers in the unit to support accreting the Goodwill drivers into the unit. The unit, therefore, should not be clarified, and I am dismissing the petition.

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<sup>1</sup> Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The Petitioner is a labor organization within the meaning of the Act. Neither party filed a post-hearing brief.

## **I. FACTS**

### **Background**

The Employer provides transportation for disabled individuals living in the Milwaukee, Wisconsin area. The Employer operates out of a facility on 13<sup>th</sup> Street in Milwaukee, which includes an office building, a garage, and a parking lot where buses are parked when not in use.

The Union was certified on November 9, 1999. At the hearing the parties stipulated to the following description of the current existing unit:

All full-time and regular part-time operators,<sup>2</sup> reservationists, mechanics, utility workers and dispatch clerks employed by Laidlaw Transit Services, Inc. and its successors in Milwaukee County; but excluding dispatchers, payroll clerks, trainers, road supervisors, managers, guards and supervisors as defined in the Act.

The Union and the Petitioner are parties to a collective-bargaining agreement, which is effective from June 1, 2003 to May 31, 2006.

For some time, the Employer has had a contract with Milwaukee County Transit Service (MCTS) to provide paratransit transportation services for disabled persons living in Milwaukee County.<sup>3</sup> Prior to November 1, 2003, the Employer serviced the northern half of Milwaukee County. Since this date, the Employer has serviced the southern half of the County and has ceased to provide services for the northern half. Under the contract, the Employer provides “demand” services. A disabled person will contact the Employer and schedule a ride for a specific time. A driver will then pick up the individual in a paratransit bus and transport him or her to the destination, which is often a doctor’s office or a place where the individual will go

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<sup>2</sup> Bus drivers are classified as operators.

<sup>3</sup> Exactly how long the Employer has held this contract is not clear from the record.

shopping. The Employer refers to work related to the MCTS paratransit contract as the “demand” side of its operation.

As of January 1, 2004, the Employer started servicing a second contract it had been awarded.<sup>4</sup> Under this second contract, the Employer transports employees of Goodwill Industries to and from their work at Goodwill’s facilities in the Milwaukee area. The employees are picked up in the mornings and driven home in the afternoon. During the middle of the day, the Employer will also perform charter work for Goodwill in which employees of Goodwill are driven from a Goodwill facility to a recreational location, such as McDonald’s, a park, or a museum. The Employer refers to work related to the Goodwill contract as the “Goodwill” or “agency” side of its operation.

Before the Employer was awarded the Goodwill contract, Goodwill Industries, itself, held the contract, and the drivers providing the transportation services were directly employed by Goodwill. The drivers, while they were employed by Goodwill, were represented by another union. The record does not indicate which union this was, other than it was not the Union. After the Employer learned it had been awarded the Goodwill contract, it appears there were some negotiations between the Employer and the Union concerning adding the Goodwill drivers to the unit. On November 12, 2003, the Employer made a proposal to the Union to include the Goodwill drivers in the unit. Under this proposal, the Goodwill drivers would receive the same wages and benefits that demand drivers were receiving under the collective-bargaining agreement, with the exception that Employee Only medical coverage would be modified for the

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<sup>4</sup> It appears that this contract may also be with MCTS.

Goodwill drivers.<sup>5</sup> The Union rejected this proposal on December 17, 2003,<sup>6</sup> and the Union and the Employer never did reach an agreement regarding the Goodwill drivers.

The Employer did invite the Goodwill drivers to apply for employment. The Employer ended up hiring only about three drivers who were employed by Goodwill. The Employer hired a total of approximately 30 drivers to perform the Goodwill work. It is these drivers the Union is seeking to add to the pre-existing unit of employees who had been doing demand work.

### **The Organizational Structure of the Employer's Facility**

Suzanne Plant is the Project Manager for the Employer's 13<sup>th</sup> Street facility and she oversees all the departments at the facility. The Employer maintains separate departments for its demand and agency/Goodwill work. These departments are headed by Operations Managers who report directly to Plant. Jim Hellen is the Operations Manager for the demand side and Jim Giordano is the Operations Manager for the agency/Goodwill side. The demand side operation includes approximately 102 full-time and 8 part-time drivers, approximately 7 full-time dispatchers, and approximately 5 full-time and 1 part-time reservationists. The agency side operation is comprised of approximately 30 full-time and 1 part-time drivers and approximately 2 dispatchers.

In addition to the demand and agency operations, the Employer also operates a garage for the maintenance of its buses. The garage is managed by Maintenance Manager Bob Losieniecki. Losieniecki supervises approximately five or six mechanics and five fuel/detail

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<sup>5</sup> The collective-bargaining agreement provides that the Employer will pay 60% of the premium for Employee Only coverage for employees who have been employed for six months to a year. The contract further provides that the Employer will pay 100% minus \$1.00 of the premium for Employee Only coverage for employees who have been employed more than one year. With respect to the Goodwill employees, the Employer proposed to only pay 50% of the premium for Employee Only coverage for drivers who have been employed for six months to a year and 70% of the premium for Employee Only coverage for drivers who have been employed more than one year.

<sup>6</sup> In rejecting the proposal, the Union took the position that the Goodwill drivers, along with any other new hires, shall fall under the umbrella of the 2003-2006 contract and shall be considered to be represented by the Union.

employees. The facility has one additional manager, DeWayne Grady, who is the Driver Development and Safety (DDS) Manager. Grady currently hires the drivers for both the demand and agency sides, oversees training for both these sides, handles safety issues, and handles FMLA and worker's comp issues.

## **Vehicles**

The demand side has approximately 75 vehicles. Almost all of these vehicles are paratransit buses which the Employer classifies as either 1200 series or 600 series. The 1200 series buses can carry ten ambulatory and four wheelchair passengers. The 600 series buses can carry eight ambulatory and three wheelchair passengers. There are approximately 38 1200 series and 36 600 series buses on the demand side. A driver does not need to have a commercial driver's license (CDL) to drive either the 1200 series or 600 series buses.

The agency side has approximately 35 vehicles. Approximately seven or eight of these vehicles are paratransit buses which the Employer classifies as 500 series. The 500 series buses can carry ten ambulatory and four wheelchair passengers and appear to be the same or similar vehicle as the 1200 series buses on the demand side. The Employer, however, classifies these buses as 500 series to distinguish them as agency side vehicles. The remaining vehicles on the agency side appear to be 72-passenger paratransit buses. These 72-passenger buses are modified school buses which have been equipped with a ramp lift for wheelchairs and which have been spatially configured to carry wheelchair, as well as ambulatory, passengers. Although a CDL is not generally required to drive a 500 series bus, a CDL is required to drive a 72-passenger bus.

Both demand side vehicles and the agency side vehicles are parked in the parking lot of the 13<sup>th</sup> Street facility when they are not in service. The demand side vehicles are parked together in one designated area, and the agency side vehicles are parked together in a separate

designated area. The areas where the agency and demand vehicles are parked appear, though, to be right next to each other. Demand side drivers only drive demand side vehicles—600 and 1200 series buses--and do not drive agency side vehicles. Likewise, agency drivers only drive agency vehicles—500 series and 72-passenger buses--and do not drive demand vehicles.

Both demand side and agency side vehicles are serviced and maintained by mechanics in the garage at the 13<sup>th</sup> Street facility. If an agency or a demand side driver has a problem with a vehicle they will report it to Maintenance Manager Bob Losieniecki.

### **Operations and Driver Duties—Demand Side.**

The demand side appears to run almost continuously—23 hours a day, seven days a week. On the demand side, a client who needs a ride will call the Employer and speak with a reservationist who will book the ride. Reservations booked by the reservationists are then given to a scheduler who schedules the rides into a route. The scheduled route is then given to a dispatcher who prints out a manifest. The dispatcher will then give the manifest to the driver who has been assigned to the route. A demand side driver's routes are different each day due to the fact that the driver is serving different clients each day.

A demand side driver will start his or her work day by picking up a manifest from the dispatcher. The driver will then go out in the lot and perform a “pre-trip” inspection of the vehicle he or she will be using and complete an inspection form. Demand side drivers provide door-to-door service. When a driver arrives at a client's home, the driver will go to the door of the client's home and meet the client there. The driver will then assist the client to the vehicle. If the client is in a wheelchair, the driver will put the client in a lift ramp to load them into the vehicle. Once a client is in the bus, the driver will make sure that the client is strapped in

properly. When the bus arrives at the client's destination, the driver will unstrap the client, assist the client off the bus, and assist the client to the door of the building.

The drivers need to radio dispatch when they arrive at a client's home and when they have dropped off the client at the client's destination. The demand side drivers only report to the demand side dispatchers. The demand side dispatchers work on a separate side of the building from the agency dispatchers. The demand side dispatchers do not perform any dispatch functions for the agency side.

Demand side drivers collect fares from the clients, which the drivers give to the dispatchers at the end of their shifts. Demand side drivers also wear uniforms. With the exception of some limited training activities, there is no evidence that demand side drivers ever use agency side vehicles or perform any agency work.

### **Operations and Driver Duties—Agency/Goodwill Side**

The agency side was described by Jim Hellen as being more of a 9 to 5 operation than the demand side.<sup>7</sup> Agency side drivers perform both routed service and charter work. The drivers perform routed service when they pick up Goodwill employees in morning and take the employees home from work in the afternoons. These morning and afternoon routes are set routes, and a driver will be usually driving the same route, picking up the same passengers daily. There are minor variations, such as a new passenger being added to the route or a passenger who has cancelled his or her ride for the day.

Agency drivers will drive charter routes for Goodwill during the middle of the day between their morning and afternoon routes. Once a month, Goodwill will send Operations Manager Jim Giordano a list of charters for the month. Evidently, the agency drivers can

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<sup>7</sup> No specific hours of operation for the agency side are in the record.

volunteer to do a charter route. However, if there are not enough volunteers, the Employer will assign a charter to a driver. Demand drivers perform no Goodwill charter runs.

An agency driver, like a demand driver, will start his or her day by picking up a manifest and performing a pre-trip inspection of his or her vehicle. Paul Singleton, a driver of one of the smaller paratransit buses, testified that he, like the demand side drivers, provides door-to-door service for his passengers. He picks up his passengers at the doors of their homes, assists them onto the bus, and makes sure they are properly strapped in. If a passenger is in a wheelchair, Singleton will attend them to the ramp and secure them in the ramp lift, which then lifts the passenger into the bus.

Suzanne Plant testified that the 72-passenger buses on the agency side for the most part provide curb-to-curb, as opposed to door-to-door service. However, Jamie Dobbs, an agency driver who drives a 72-passenger bus, testified that she will sometimes go to the door of a passenger's home and assist him or her. Dobbs testified that this depends on the disability of the person. Like drivers of the smaller paratransit buses, drivers of the 72-passenger buses assist wheelchair passengers on and off the bus with the ramp lift and make sure that both ambulatory and wheelchair passengers are properly strapped in.

It appears that agency drivers are required to radio dispatch whenever they stop to pick up or drop off passengers. Agency drivers report only to the agency dispatchers, and the agency dispatchers only deal with agency drivers.

Agency drivers do not wear uniforms and do not collect fares from passengers. With the possible exception of some limited training activities, there is no evidence that agency drivers ever perform demand side work.



## **Hiring and Training**

Drivers on both the agency and demand sides are currently hired by DDS Manager DeWayne Grady and Rose Craft, the Employer's Classroom Instructor for drivers. Grady and Craft have authority to hire without obtaining approval from any of the other managers at the facility. It appears from Suzanne Plant's testimony that when the Employer was initially hiring drivers to perform the Goodwill work, Don Johnson, a DDS manager from Minneapolis, did the hiring of these drivers.

The Employer provides all its drivers with both classroom and behind the wheel training. It appears that currently both agency and demand drivers receive their classroom instruction from Rose Craft. It is not entirely clear from the record, but agency and demand drivers may be trained in separate classes.

With regard to behind the wheel training, the Employer on the demand side has drivers in the unit who have been certified by the Employer to perform this training. The employees are paid a premium of \$1.00 an hour extra for the time they spend training other employees. Although it is not entirely clear from the record, it appears that demand drivers generally receive their behind the wheel training from a co-worker who has been certified to train by the Employer. It also appears that demand side driver trainers have refused to train agency drivers, because the agency drivers are not Union. Consequently, it appears the Employer may be certifying some agency drivers to perform behind the wheel training for new agency drivers.

When the Employer initially hired the agency drivers, Rose Craft received training assistance from Don Johnson and outside corporate trainers who were brought in, and the bulk of the training appears to have been performed by Johnson and the outside trainers. There is also

evidence that about three or four agency drivers received training from demand side drivers.

Paul Singleton, an agency driver, testified that he received behind the wheel training from four demand side drivers. Verlynda Ivory, a demand side driver trainer, testified that she trained three or four drivers who ended up working on the agency side, including Paul Singleton.<sup>8</sup> Ivory did testify that she was under the impression that Singleton was going to be working on the demand side when she trained him and that Singleton was sent over to the agency side once they were done training him. From Ivory's testimony, it appears that the demand side trainers were unaware that their trainees were going to be working on the agency side at the time the trainers were performing the training. There is no evidence that any demand side trainers currently train agency side drivers.

### **Wages, Benefits, and Other Terms and Conditions of Employment**

The Employer appears to be generally utilizing the same wage scale for the agency drivers as appears in the collective-bargaining agreement. However, five agency drivers are paid wage rates which are 15 to 40 cents higher than the highest wage rate in the collective-bargaining agreement. It is not entirely clear what benefits the agency drivers are currently receiving.<sup>9</sup>

All drivers, both agency and demand, report to work at the 13<sup>th</sup> Street facility. However, as discussed above, the drivers receive their manifests separately, from agency and demand dispatchers who work on different sides of the building. Both agency and demand employees use the same lunch/break room and the same restrooms. Both agency and demand employees

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<sup>8</sup> Singleton also testified that after he was hired, and when he was receiving classroom instruction from Rose Craft, she informed him that he would be working on the demand side.

<sup>9</sup> The Union entered into evidence Petitioner Ex. 3, a proposal the Employer submitted to the Union on November 12, 2003, regarding wages and benefits the Employer was planning on offering to the Goodwill drivers who applied for employment. At one point, Suzanne Plant testified that as far as she knew, the wages and benefits in Petitioner Ex. 3 reflected what was being paid to agency drivers currently. However, later in her testimony she testified that she had not been actively involved with benefits for the agency side and could not give certain testimony on the benefits agency drivers are currently receiving.

also share the same employee parking lot, which Jim Hellen described as being first come, first served. Both agency and demand employees see DDS Manager DeWayne Grady if they would like to make an FMLA request or have a worker's compensation issue. Requests for vacation are made within each department. To make a vacation request, an agency employee will contact dispatch and agency Operations Manager Jim Giordano, and a demand employee will contact dispatch and demand Operations Manager Jim Hellen.

All drivers on both the agency and demand sides are required to have a PPVL, a public passenger vehicle license. This license is required of any driver who transports disabled individuals. Demand side drivers are not required to have a CDL, and Suzanne Plant testified that probably less than 10 demand drivers currently have one. Suzanne Plant testified that when hiring on the agency side, the Employer does look for someone with a CDL. Currently, about 19 of the agency side drivers have a CDL.

### **Supervision**

The demand side drivers are supervised by Operations Manager Jim Hellen. Hellen does not supervise drivers on the agency side. The agency side drivers are supervised by Operations Manager Jim Giordano. Giordano does not supervise drivers on the demand side. Both Hellen and Giordano have the authority to independently issue written warnings. Both Giordano and Hellen need to consult with Project Manager Suzanne Plant about any discipline that is more severe than a written warning. Moreover, none of the managers in Milwaukee can terminate any employee without first consulting with Mary Schottmiller, Laidlaw's Director of Human Resources.<sup>10</sup> Verlynda Ivory, the Union's Chief Steward, testified that most of the time, with

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<sup>10</sup> There was testimony that Schottmiller's office is in Seattle or Kansas City. However, documentary evidence indicates that at least in November 2003, Schottmiller's office was in Minneapolis, Minnesota.

regard to disciplinary actions and labor relations matters, she has been dealing with Suzanne Plant.<sup>11</sup>

## **II. DISCUSSION**

### **Legal Standard**

The Board has defined an accretion as the addition of a relatively small group of employees to an existing unit where these additional employees share a sufficient community of interest with the unit employees and have no separate identity. *Safety Carrier, Inc.*, 306 NLRB 960, 969 (1992), quoting *Safeway Stores*, 256 NLRB 918, 924 (1981). The Board has followed a restrictive policy in finding accretions to existing units because it forecloses the rights of employees to choose their own bargaining representative. *Archer Daniels Midland Co.*, 333 NLRB 673, 675 (2001); *Towne Ford Sales*, 270 NLRB 311, 311 (1984) enfd. 759 F.2d 1477 (9<sup>th</sup> Cir. 1985); *Comar, Inc.*, 339 NLRB No. 110, slip op. at 14 (2003). Thus, the Board in *Melbet Jewelry Co.*, 180 NLRB 107, 110 (1969), emphasized that it will not, “under the guise of accretion, compel a group of employees, who may constitute a separate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election or by some other evidence that they wish to authorize the [u]nion to represent them.” The accretion doctrine is not applicable to situations in which the group sought to be accreted would constitute a separate appropriate bargaining unit. *Passavant Retirement & Health Center*, 313 NLRB 1216 (1994). Rather, the Board will find a valid accretion “only when the additional employees have little or no separate group identity . . . and when the additional employees share an overwhelming community of interest with the preexisting unit to

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<sup>11</sup> Ivory testified that before Jim Hellen started working at the Employer, she was basically dealing with Plant. Hellen started working for the Employer around Christmas 2003. Ivory also testified that Hellen is in training right now. Although it is not clear from the record, Ivory’s testimony may indicate that she will be working more with Hellen in the future when he is fully trained.

which they are accreted [footnotes omitted].” *Gitano Distribution Center*, 308 NLRB 1172, 1174 (1992) quoting *Super Valu Stores*, 283 NLRB 134, 136 (1987).

In determining whether new employees share a community of interest with an existing bargaining unit, the Board weighs various factors including: integration of operations; centralization of management and administrative control; geographical proximity; similarity of working conditions, skills and functions; common control of labor relations; collective bargaining history; and interchange of employees. *Archer Daniels Midland*, *supra*, at 675. Employee interchange and common day-to-day supervision are the two most important factors. *Id.*; *Towne Ford Sales*, *supra*, at 311-12; *Passavant Retirement & Health Center*, *supra*, at 1218.

### **Analysis**

Applying the above legal standards to the facts of this case I have concluded that, although there are several factors which would weigh in favor of accreting the agency drivers into the existing unit, the absence of two important factors, common day-to-day supervision and interchange, compels me to find that the agency drivers should not be accreted into the unit.

The factors which weigh in favor of accreting the agency drivers are as follows. There is no question that both agency and demand drivers have similar skills, functions, and working conditions. They are all drivers of paratransit buses which carry disabled individuals as passengers. Indeed, agency drivers who drive 500 series buses are driving the same vehicle as agency drivers who drive 1200 series buses.<sup>12</sup> Many of the daily activities the drivers perform, from doing the “pre-trip” inspection of their vehicles to the way they handle passengers, are also identical or very similar. Further, the drivers on both sides, with a few exceptions, earn

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<sup>12</sup> Agency drivers who drive the 72-passenger buses are required to have a CDL. However, I do not see this as a significant skill difference for three reasons: 1) not all agency drivers have CDLs; 2) it appears that some demand drivers have CDLs or have had them in the past; and 3) the collective-bargaining agreement contemplates that some demand drivers will have a CDL, as the contract provides for a 25 cent an hour premium for all hours worked driving a CDL vehicle.

comparable wages. Geographical proximity also favors accretion as both agency and demand drivers work out of the same facility, use the same lunchroom and restrooms, and park in the same employee parking lot.

Another factor favoring accretion is common control of labor relations. Major discipline is centralized. Operations Managers Hellen and Giordano cannot issue anything beyond a written warning without consulting with Project Manager Suzanne Plant, and no manager in Milwaukee can discharge without consulting with Laidlaw's Director of Human Resources, Mary Schottmiller. Other aspects of labor relations also appear to be centralized at the Project Manager level or higher. For instance, it was Mary Schottmiller who made the proposal to the Union in November 2003 regarding combining the Goodwill drivers with the existing unit.

Although not completely clear from the record, it also appears that the administration of most benefits is centralized. Both agency and demand employees go to DDS Manager DeWayne Grady regarding worker's comp issues and to request FMLA leave.<sup>13</sup> The administration of the Employer's 401(k), for which both agency and demand drivers appear to be eligible, is also centralized.<sup>14</sup> Other aspects of the Employer's operation also centralized include hiring, which is performed for both agency and demand sides by Grady and Rose Craft, and bus maintenance, which is performed for both agency and demand side buses, by the Employer's mechanics. Grady also oversees all safety issues for both the demand and agency sides.

Although the factors discussed above—similar skills, functions, and working conditions, common control over labor relations, centralized administration of benefits, and the

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<sup>13</sup> Plant also testified that she can handle FMLA requests.

<sup>14</sup> The 401(k) plan had been administered by Danna Rosenberg, one of Suzanne Plant's administrative assistants. Rosenberg has left employment with the Employer, and Plant testified that the administration of the 401(k) may be transferred to DeWayne Grady in the future.

centralization of some of the facility's operations—militate toward finding an accretion, two important accretion indicators are missing in this case.

First, there is no interchange of drivers between the agency side and the demand side. Demand drivers drive demand side buses and service the MCTS paratransit contract exclusively. Agency drivers drive agency side buses and service the Goodwill contract exclusively. The only possible exception is the training of three or four agency drivers by demand side driver trainers. However, I find this exception to be insignificant because of the small number of employees involved and because there is no evidence that training of agency drivers by demand drivers has continued.

Second, demand drivers and agency drivers do not have common day-to-day supervision. Demand drivers are supervised on a day-to-day basis by Operations Manager Jim Hellen and agency drivers are supervised on a day-to-day basis by Operations Manager Jim Giordano. Hellen does not supervise agency drivers and Giordano does not supervise demand drivers. Further, the dispatchers for the agency side and demand side are different and work on different sides of the building. It is the dispatchers who give the drivers their daily assignments and who are in radio contact with the drivers throughout the day.

Finally, the factor of bargaining history is difficult because there is only record evidence that when Goodwill Industries held the contract, the drivers employed by Goodwill were represented by a union, which was not the Amalgamated Transit Union. There is no evidence of the Goodwill bargaining unit. However, this somewhat sketchy history of separate representation, on the balance, is an additional factor militating against accretion.

Without evidence of the two most important factors—employee interchange or common day-to-day supervision—I am compelled to find that the agency drivers are not an accretion to

the existing unit. I recognize that many other factors favoring accretion are present in this case, but Board case law is clear that although virtually all other factors may favor accretion, an accretion generally cannot be found if there is no employee interchange and common day-to-day supervision. *Towne Ford Sales, supra*, at 311-12; *Silver Court Nursing Center*, 313 NLRB 1141 (1994). I shall, therefore, dismiss the petition in this case.<sup>15</sup>

### **ORDER**

It is hereby ordered that the petition for unit clarification is dismissed.<sup>16</sup>

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, DC 20570. This

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<sup>15</sup> In his opening statement, counsel for the Union argued in cases where employees are hired into a classification which is exactly the same as an existing classification, the Board has a presumption that the new employees should be considered part of the unit and there is no need to apply the more complex accretion analysis. Counsel further argued that because the agency drivers are performing the same work as the demand drivers, they should, under the above presumption, be found to be members of the unit. In *Gourmet Award Foods, Northeast*, 336 NLRB 872 (2001), the Board did hold that when an established bargaining unit expressly encompasses employees in a specific classification, new employees hired into that classification are included in the unit and an accretion analysis is not applied. *Gourmet Award Foods*, however, involved a situation in which temporary employees were working side-by-side with unit employees in the same warehouse and were performing exactly the same functions as the unit employees. *Gourmet Award Foods*, further, arises in an *M.B. Sturgis*, 331 NLRB 1298 (2000), context. *Gourmet Award Foods* is not applicable to the instant case. First, this case does not involve *M.B. Sturgis* issues. Moreover, the working conditions in the instant case are completely different than in *Gourmet Award Foods*. The agency drivers herein are not working side-by-side with the demand drivers. Instead, the drivers are working in different departments, are using separate vehicles, are servicing different passengers, and are supervised on a day-to-day basis by different supervisors.

In *The Sun*, 329 NLRB 854 (1999), the Board held that in unit clarifications involving bargaining units defined by work performed, if new employees perform job functions similar to those performed by unit employees, the Board will presume that the new employees should be added to the unit. *The Sun*, however, is inapposite to this case because it only applies to cases where the bargaining unit is defined by the work performed. In the instant case the bargaining unit is defined by job classifications, not by the work performed.

<sup>16</sup> The Decision and Order Denying Unit Clarification herein does not constitute a recertification of the Union.



request must be received by the Board in Washington by April 29, 2004.

Signed at Milwaukee, Wisconsin on April 15, 2004.

/s/Joyce Ann Seiser  
Joyce Ann Seiser, Acting Regional Director  
National Labor Relations Board  
Thirtieth Region  
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